

Retail and Hospitality

The Prejudicial Impact of Physician Liens on Personal Injury Litigation

By Stacy D. Fulco

In the vast majority of personal injury litigation, the only doctor utilized by the plaintiff to prove her case, *i.e.*, prove her incident caused her to sustain an injury, is the plaintiff's treating physician. Defense attorneys often find this to be prejudicial since the doctor tends to have an established relationship with the plaintiff, but lately matters have become far worse for the defense. The reason for this is the almighty physician lien.

In the past, a physician's lien was somewhat a rare occurrence or at least something only used when someone did not have medical insurance. Over the last few years, physician liens have become more common place, particularly for orthopedic physicians and physical therapists. Here is a summary of how the physician lien situation often develops:

Plaintiff: "Ouch, I fell and now my knee hurts. I need a lawyer."

Plaintiff's Attorney: "I can help you."

Plaintiff: "But I don't want to pay to see a doctor."

Plaintiff's Attorney: "That's OK. Go see Dr. Smith and tell him I sent you. He will treat your knee and he won't charge you a dime."

Plaintiff: "Who pays for my medical bills?"

Plaintiff's Attorney: "Just like me, Dr. Smith will put a lien against this case and he will only get paid if we win."

The problem is that when Dr. Smith agrees to see this plaintiff, Dr. Smith knows only what the plaintiff wants him to know about the plaintiff's medical history and about the

alleged fall incident. This means Dr. Smith agrees to treat the plaintiff without knowing the strength of the legal case or the like-

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likelihood of the plaintiff winning or settling her case, thereby allowing Dr. Smith to be paid.

The prejudicial impact of the physician's lien becomes apparent when it is time for Dr. Smith to give his deposition. The plaintiff and her attorney need a doctor to offer an opinion to a reasonable degree of medical certainty that the plaintiff was injured and the injury was caused by the fall. Without such medical expert opinion testimony the plaintiff's case fails. The plaintiff and her attorney rely on Dr. Smith to offer that testimony and Dr. Smith knows he will only be paid if that testimony is offered and believed. Therefore, the chance of Dr. Smith not testifying the fall caused the plaintiff to hurt her knee is slim to none.

To make matters worse, in many states, including Illinois, the jury *cannot* be told that Dr. Smith has a lien or that he will only be paid if the plaintiff wins her case. This gives the plaintiff's attorney and Dr. Smith all of

the protection they need to do this with patient after patient. The odds are in the numbers and if a doctor will testify the fall caused the injury, more likely than not those cases will settle and Dr. Smith will be paid (as will the plaintiff's attorney).

When the collateral source rule started, it may have made sense to keep all discussion of medical insurance away from the jury but that reasoning no longer applies in 2018. Juries assume the plaintiff has medical insurance so knowledge of insurance is not likely to alter the awarding of damages. Therefore, the only thing the collateral source rule is doing now is significantly prejudicing the defendant by giving the plaintiff an opportunity to, in essence, buy a doctor's opinion behind the jury's back.

The issue is typically not in the treatment provided, it is whether the plaintiff had an incident and whether that incident caused an injury. Causation is only a topic for doctors to address if their patient is in litigation and the doctor is deposed. That is the only time a doctor thinks about, or is questioned about, causation. When no lien is involved, we must accept the doctor's causation opinion as true and reasonable because that opinion is viewed as unbiased. Once a physician's lien is imposed, the doctor's opinion is no longer unbiased and that fact should and must be made known to the jury.

Allowing a jury to rule on causation, without knowing the treating physician will only be paid if the jury believes his opinions and imposes liability, is a complete injustice and some of the most extreme prejudice that can be imposed on a defendant. This injustice needs to stop and the playing field needs to be leveled. **IDJ**



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